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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

SHANNON LIN HOSTETTLER,

Defendant and Appellant.

C062232

(Super. Ct. No. CM028445)

In July 2008, defendant Shannon Lin Hostettler pled no contest to embezzlement by a public or private officer. At a hearing in December 2008, the court (Judge Benson) found that she owed restitution in the amounts of \$12,518 for embezzled funds and \$20,146 for costs of investigation. In June 2009, the court (Judge Glusman) suspended imposition of sentence and placed defendant on probation for three years on conditions including service of 120 days in jail. She immediately was released upon the court's finding that she had 114 days' custody credit and 56 days' conduct credit. Defendant was ordered to make restitution as determined at the restitution hearing and to

pay a \$720 fine, a \$200 restitution fine, a \$200 probation revocation fine, a \$20 security fee, and a \$25 criminal justice administration fee. A \$30 conviction assessment was stricken.

On appeal, defendant contends: (1) there was insufficient evidence of loss from a bank account purportedly frozen and seized by the Internal Revenue Service (IRS); (2) an investigating accountant was not a direct victim and is not entitled to restitution; (3) the amount of restitution awarded for investigative costs was not reasonable; (4) the sentencing proceedings were improperly conducted by two different judges; and (5) she was not given sufficient monetary credit for her presentence custody. The People concede the second and fifth points. Pursuant to our general order No. 2010-002, we conclude defendant is entitled to additional presentence conduct credit. We shall modify the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2005, defendant became the treasurer of the Pleasant Valley Sports Boosters (Boosters), a private organization that raises funds for sports programs at a local high school. Over time, members of the Boosters began to suspect that defendant had embezzled an unknown amount of money from the organization.

On April 13, 2007, Boosters' board members contacted the Chico Police Department regarding the possible embezzlement. They informed an officer that they had contacted Richard Powell, a certified public accountant, to determine how much money was missing from the organization's accounts. Then they asked the

officer to initiate a criminal investigation of the matter. The investigation showed that defendant likely had misappropriated Boosters' funds.

The Boosters removed defendant as treasurer on April 27, 2007. Defendant did not return the Boosters' critical documents including bank ledgers and checks. In May 2007, she sent the local high school two cashier's checks, one for \$20,000 and another for \$6,000, payable to the Boosters.

On May 4, 2007, officers executed a search warrant for defendant's residence. She was not present during the search, but she spoke to the investigating officer by telephone. The officer advised her that there was evidence she had withdrawn at least \$52,000 from the Boosters' accounts during her tenure as treasurer.

On May 11, 2007, the Boosters received from defendant a \$26,000 cashier's check, bringing the amount she returned to the organization to \$52,000. The investigating officer learned from defendant's bank that her grandmother had written her a \$20,000 check on April 26, 2007, and a \$26,000 check on May 9, 2007. The officer contacted the grandmother who said that she was aware her granddaughter was being investigated for embezzlement and that the two checks were early inheritance payments.

When police interviewed defendant in June 2007, they asked her where all the cash from the Boosters' accounts had gone since she had used her inheritance to pay back the Boosters. Defendant answered, "'Bills, buying food, buying gas, because it belonged to me now that I gave them what you said I owed them.'"

On January 31, 2008, the investigating officer received Richard Powell's report. The report documented that defendant had withdrawn \$69,453.44 from the Boosters' accounts for no legitimate purpose. Defendant was arrested on February 4, 2008.

At a restitution hearing in December 2008, four individuals testified that defendant had informed those present at a Boosters' board meeting that the IRS had seized \$6,085 from a Boosters' bank account.

The minutes from several Boosters meetings refer to a Boosters' bank account containing \$6,085. Under the heading, "Bank account information," the minutes for October 4, 2006, state: "1. Tri Counties - we have one account here with \$6[,]085.00. . . . We will be closing the Tri Counties account."

Under the heading, "New Business," the minutes for March 5, 2007, state: "[Defendant] has been working with the IRS regarding the Booster Club paying for wages and services. She is working with IRS agent Ms. Jackson badge # 3107147."

Under the heading "Treasurer's Report," the minutes for April 10, 2007, state: "We presently have three accounts. One account has Shelle Hord and [defendant] as signers. This account has less than \$100.00 in it. A second account with the majority of booster money has [defendant] as the sole signer. Our third account has \$6[,]085.00 and is owned by the IRS. This account came to the attention of the IRS when tax returns were not filed from 2003 through part of 2006. [Defendant] is

continuing to work with an IRS representative to rectify this situation."

The Boosters eventually asked accountant Powell to conduct an audit-like review of the Boosters' financial records. He contacted the IRS to determine what had happened to the supposedly frozen funds. The IRS said that it was unfamiliar with the Boosters, apart from having issued them a tax identification number in February 2005. In addition, Powell was unable to discover any Tri Counties Bank account containing \$6,085.

Defendant testified that the IRS never seized the account, and the minutes of the Boosters' meetings were wrong.

At the close of the hearing, the prosecutor argued that defendant owed the Boosters \$12,518, exclusive of investigative expenses. This amount was based on Powell's conclusion that defendant could not account for \$58,433 but had repaid \$52,000, leaving a balance of \$6,433. That balance was added to the \$6,085 defendant previously claimed had been seized by the IRS to yield the sum of \$12,518.

Defendant's counsel argued that the \$6,085 should not be included in the restitution order because there was no evidence that a Tri Counties Bank account containing \$6,085 ever existed. The court (Judge Benson) disagreed and set restitution at \$12,518, excluding investigation fees.

At sentencing in June 2009, Judge Glusman ordered defendant to pay the amount of restitution that Judge Benson had determined at the restitution hearing.

DISCUSSION

I

Substantial Evidence Of The Restitution Amount

Defendant contends the award of \$12,518 for embezzled funds must be reduced by \$6,085 because there was no substantial evidence to support that item of loss. We are not persuaded.

"[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so." (Pen. Code,¹ § 1202.4, subd. (f).)

"At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] 'Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim. [Citations.]' [Citation.]

"The standard of review of a restitution order is abuse of discretion. "A victim's restitution right is to be broadly and

¹ Further undesignated statutory references are to the Penal Code.

liberally construed." [Citation.] "'When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.'" [Citations.]' [Citation.] However, a restitution order 'resting upon a "'demonstrable error of law'" constitutes an abuse of the court's discretion. [Citation.]' [Citation.] 'In reviewing the sufficiency of the evidence [to support a factual finding], the "'power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the trial court's findings." [Citations.] Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.] "If the circumstances reasonably justify the [trial court's] findings," the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. [Citation.]' [Citation.]

"'[T]he court's discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole. [Citations.]' [Citations.] 'There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the

order reflect the amount of damages that might be recoverable in a civil action. [Citation.]' [Citation.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26-27.)

At the restitution hearing, four individuals testified that defendant had informed them at Boosters' meetings that there had been \$6,085 in an account at Tri Counties Bank but those funds had been frozen and then seized by the IRS. The minutes of several Boosters' board meetings corroborated their testimony. The statement under "Treasurer's Report" in the April 10, 2007, minutes is especially incriminating given that defendant was the treasurer and the statement says, "Our third account has \$6,085 and is owned by the IRS."

Because the accountant could not find this account, and the IRS could not confirm any investigation of the Boosters, the trial court could deduce that defendant had embezzled a like sum of money from other Boosters' accounts or sources, had spent the embezzled money, and had fabricated the IRS story to explain its absence. In her reply brief, defendant concedes that this inference is logical. Because the circumstances reasonably justify the trial court's finding that defendant was responsible for the \$6,085, the fact the circumstances might also reasonably support a contrary finding does not require reversal of the judgment. (*People v. Millard, supra*, 175 Cal.App.4th at pp. 26-27.)

Rather, it was defendant's burden to show that the Boosters' loss was not as great as they had claimed. (*People v. Millard, supra*, 175 Cal.App.4th at pp. 26-27.) Defendant

offered no explanation as to why minutes from board meetings would mistakenly reflect that *she had stated* that funds had been seized by the IRS, or why persons at the meetings would recollect that *she had told them* that the IRS had seized funds. Because defendant failed to rebut the Boosters' prima facie case of loss, the trial court properly ordered her to make restitution for the \$6,085.

II

Restitution To Accountant

Defendant contends, and the People concede, the order for restitution to accountant Richard Powell must be modified to require restitution to the victim, the Boosters. We accept the People's concession.

Defendant does not appear to dispute that the cost of Powell's investigation is a proper item of restitution to the Boosters. We note that a restitution order "shall be of a dollar amount that is sufficient to fully reimburse the victim" for economic losses caused by the defendant's criminal conduct. (§ 1202.4, subd. (f)(3).) Economic loss includes "costs of collection accrued by a private entity on behalf of the victim." (*Id.*, subd. (f)(3)(H).) Here, the Boosters' economic loss included the funds embezzled as well as the fees and costs incurred to recover those funds. Recovery of "costs of collection" necessarily includes the cost of the investigation to determine the extent of the Boosters' loss. Under these circumstances, to deny the organization the cost of investigative fees is to fail to fully reimburse it for its

economic loss. (*People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409.)

We shall modify the judgment to make the restitution for Richard Powell's services payable to Pleasant Valley Sports Boosters.

III

Reasonableness Of Investigative Costs

Defendant contends the amount of restitution awarded for Richard Powell's investigative costs was not reasonable. We disagree.

At the restitution hearing, Powell testified that the Boosters had asked him to prepare a report detailing their accounting records. At first, he had agreed to perform the review pro bono, but he ended up billing the Boosters his normal hourly rate. His charges for preparing the report totaled \$15,265. He stated it took him over 100 hours to complete the report. Powell testified that he had charged an additional \$4,881 for time spent on the case after completing the initial report. The court ultimately ordered defendant to pay Powell's entire fee, \$20,146.

We have already explained that the cost of Powell's investigation is a proper item of restitution to the Boosters. (See part II, *ante*.)

Defendant complains that Powell's testimony was incomplete in two respects. First, although Powell accurately testified that his initial billing totaled \$15,265, he did not detail all the component parts of that figure. Specifically, he did not

testify that the total included \$3,885 to review his engagement agreement and report to the Boosters.

Similarly, although Powell accurately testified that his supplemental billing totaled \$4,881, he did not testify at the hearing that the total included \$1,972 for time spent traveling to, and at, the courthouse.

The omitted amounts are listed on Powell's invoices, which in turn were attached to the probation report prepared subsequent to the restitution hearing. It is not clear whether the invoices were available at the restitution hearing.

As noted, the People's prima facie case for restitution can consist of a victim's testimony, or other claim or statement of, the amount of economic loss. (*People v. Millard, supra*, 175 Cal.App.4th at pp. 26-27.) Here, Powell's testimony that his fees totaled \$15,265 and \$4,881 constituted prima facie evidence that those amounts were correct. "Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant's criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. [Citation.]" (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) Defendant cross-examined Powell at the hearing and could have inquired whether the sums he was claiming included any amounts not already discussed in his testimony. Her failure to do so does not support her claim that she has been deprived of a contested restitution hearing. (§§ 1202.4, subd. (f)(1), 1203.1k.)

Defendant claims Powell was not entitled to restitution for his appearance in court because he was not a direct victim. This argument is moot in light of our modification making restitution payable to the Boosters, the direct victim of defendant's conduct. (See part II, *ante*.) The Boosters evidently became obligated to pay Powell, who was working for them during the hours that he appeared in court. They were entitled to restitution from defendant for their obligation to Powell. There was no abuse of discretion. (*People v. Millard, supra*, 175 Cal.App.4th at pp. 26-27.)

IV

Procedure At Sentencing Hearing

Defendant contends her sentencing hearing was improperly split between two judges, Benson and Glusman. This assertedly violated her due process rights because Judge Glusman's order to make restitution for Powell's entire fee was based on inaccurate information. We are not persuaded.

The restitution hearing took place on December 1 and 8, 2008. Following the presentation of evidence and arguments of counsel, Judge Benson set restitution at \$12,518 for embezzled funds and \$20,146 for investigation costs. Thereafter, defense counsel reopened for the purpose of stating his objection to the award for investigation costs. Specifically, counsel argued that the Boosters had no legal obligation to pay Powell because Powell had agreed to work for the Boosters pro bono. The court made no oral ruling on the objection.

Judge Glusman sentenced defendant on June 17, 2009. He ordered defendant to make restitution in the amounts determined by Judge Benson at the restitution hearing.

At sentencing, defendant never objected that the hearing should be conducted by Judge Benson rather than Judge Glusman. Her failure to object to Judge Glusman presiding over the hearing forfeits any contention that she should have been sentenced by Judge Benson. (*People v. Mancha* (1963) 213 Cal.App.2d 590, 594-595.)

In any event, “‘It is settled that it is not error for a judge other than the one who tried a criminal case to pronounce judgment and sentence. [Citations.]’” (*People v. Mancha, supra*, 213 Cal.App.2d at p. 594.)

Defendant speculates that Judge Glusman’s restitution order was “not based on accurate information” because there was “no showing” that he had access to the transcript of the restitution hearing. We disagree.

Judge Glusman imposed the same restitution amounts that Judge Benson had determined following a contested hearing. Nothing in the record suggests that Judge Benson would have ordered any lesser amount had he presided at sentencing. No prejudice appears.

Defendant did not press for a ruling on her objection that restitution for investigative costs was improper because Powell had acted as a volunteer. “[T]he absence of an adverse ruling precludes any appellate challenge.” (*People v. McPeters* (1992) 2 Cal.4th 1148, 1179.) In any event, the record supports an

implied finding that, although Powell may have started out as a volunteer, he ultimately submitted two invoices to the Boosters.

In part III, *ante*, we rejected defendant's argument regarding discrepancies between the amounts Powell described in his testimony and the amounts later shown in his invoices. We concluded that Judge Benson had an adequate basis to order restitution for the sums shown on the invoices. Nothing in the record suggests that Judge Glusman would have ordered any lesser amount had he earlier presided over the restitution hearing. No error is shown.

V

Presentence Credits

Pursuant to this court's miscellaneous order number 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to section 4019, effective January 25, 2010, apply retroactively to her pending appeal and entitled her to additional presentence credits. As expressed in our recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354 (petn. for review filed Apr. 19, 2010, S181963), we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (§ 4019, subds. (b)(1) & (c)(1); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently defendant, having served 114 days in presentence custody, is entitled to 114 days of conduct credit.

VI

Monetary Credit For Presentence Custody Credits

Defendant contends, and the People concede, she is entitled to monetary credit for each day of presentence credit exceeding the 120 days she was ordered to serve in jail. We accept the People's concession.

Section 2900.5, subdivision (a) provides in relevant part: "[W]hen the defendant has been in custody . . . all days of custody of the defendant, including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, . . . at the rate of not less than thirty dollars (\$30) per day In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines." (See *People v. McGarry* (2002) 96 Cal.App.4th 644, 646-647.)²

Defendant was entitled to 228 days of presentence credit. (See part V, *ante*.) The court applied 120 days of credit toward

² Defendant does not contend that the credit extends to her \$736 presentence probation report fee or her \$420 public defender fee. Any such contention is forfeited. (E.g., *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

her jail term. The remaining 108 days are to be converted to monetary credit. (\$ 2900.5.) Because she does not claim credit at a rate greater than \$30 per day, we conclude she is entitled to \$3,240 credit against her fines. Because this credit exceeds the total amount of defendant's fines, we shall modify the judgment to deem her fines paid in full.

DISPOSITION

The judgment is modified to award defendant 114 days' conduct credit and \$3,240 credit against her fines, thus paying them in full. The order to make restitution to Richard Powell is modified to make the restitution payable to Pleasant Valley Sports Boosters. As so modified, the judgment (order of probation) is affirmed.

ROBIE, J.

We concur:

SIMS, Acting P. J.

BUTZ, J.